(2)

No. 99-749

Supreme Court, U.S.
FILED
1999

In The

Supreme Court of the United States

LOT$OFF CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

A. Introduction

Conned by thieves pretending to be purchasers of its stock, Petitioner issued stock certificates in the name of a bank where the thieves had an account. That bank, a customer of The Chase Manhattan Bank ("Chase"), directed Chase to deposit the certificates into its account at Chase. Following its customer's instructions, Chase dutifully did so. The stock ended up in the hands of the thieves who made off with it without paying Petitioner.

Petitioner sued the thieves and their bank. Twenty-one months later – as an apparent after-thought – it sued Chase. During trial, the thieves' bank settled, and the case went to the jury against Chase alone, the thieves having defaulted. The jury found Chase liable for $12,975,000 in compensatory, and $138,000,000 in punitive damages – an award five times higher than the largest punitive damage award ever affirmed by a federal court.

On appeal, the Fifth Circuit reversed the punitive damages, finding the evidence legally insufficient to establish the malice or recklessness required by Texas law for a punitive award. In particular, the court found that Chase's conduct amounted, at worst, to a "processing error" and that Chase was simply "slow to react" to Petitioner's expressions of concern about possible problems.[1]

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[1] At trial and on appeal, Chase urged that it was Petitioner's own carelessness in issuing the stock and failing to respond to indications of improper conduct by the thieves which caused any loss and, in any event, that nothing Chase

B. Proceedings Below

At the close of Petitioner's case, Chase made a motion for judgment as a matter of law on the ground that Petitioner had not established its conversion claim – the claim on which its prayer for punitive damages rested. The trial court denied that motion, as well as the renewed motion for judgment as a matter of law on the same ground which Chase made after the close of all evidence. The next day, before the jury was charged, Chase objected to the submission of any instruction on punitive damages on the ground that there was no evidence to support a punitive award. The District Court overruled the objection.

On appeal, the Fifth Circuit vacated the punitive damages award, finding that Chase's liability for conversion was, at worst, the result of a processing error made by a "low-level Chase employee conducting high-volume business." Pet. App. A at 19a; *50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A.*, 180 F.3d 247, 256 (5th Cir. 1999). Although the court found that Chase was "slow to react" to Petitioner's expressions of concern about the stock, it concluded that neither the processing error nor the delay warranted any punitive award. Pet. App. A at

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did, or failed to do, contributed to the damages claimed. Remarkably, in its Petition, Petitioner concedes the latter point by stating that its damages resulted from failing to receive the stock proceeds in time to "obtain merchandise for the [1994] holiday season." Petition for Certiorari ("Pet.") 11. From the chronology of events set forth in the Petition itself, however, it is unquestionable that the conduct of Chase about which Petitioner complains could not possibly have caused it any loss until *1995*. *Id.* 9-12

20a; *50-Off Stores*, 180 F.3d at 256. The court also held that Petitioner's evidence demonstrated "at most . . . errors in judgment and technical flaws in Chase's procedures that left them exposed to a cunning criminal." Pet. App. A at 21a; *50-Off Stores*, 180 F.3d at 257. "[D]espite [Petitioner's] claims to the contrary," the Court noted, "it presented no evidence that Chase or any of its employees intended to illegally convert the stock or otherwise aid in [the thieves'] criminal scheme." Pet. App. A at 19a; *50-Off Stores*, 180 F.3d at 256.

Petitioner seeks review in this Court solely on the ground that Chase did not make a formal Rule 50 motion before the case went to the jury.

II. ARGUMENT

A. Chase Adequately Preserved Its Objection To The Sufficiency Of Evidence On Punitive Damages.

1. The Fifth Circuit's Opinion Is Fully Consistent With Prior Decisions.

Petitioner argues that this case is distinguishable from the two cases the Fifth Circuit cited in support of its ruling, *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir. 1996), *cert. denied*, 519 U.S. 869 (1996), and *Polanco v. City of Austin*, 78 F.3d 968, 975 (5th Cir. 1996), because the defendants in those cases had filed Rule 50 motions at the close of the plaintiffs' case. Pet. 21. But the Circuit has often held that an objection to a jury instruction preserves an insufficiency

claim without a Rule 50 motion. *See, e.g., Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir. 1986) (objection to jury instruction on damages for mental distress preserves right to raise issue in motion for judgment n.o.v. even though party did not move for directed verdict on same grounds); *Texoma Ag-Products, Inc. v. Hartford Accident & Indemnity Co.*, 755 F.2d 445, 448 (5th Cir. 1985) (party preserved error by objecting to jury charge on sufficiency of evidence grounds without motion for directed verdict); *Wells v. Hico Independent School Dist.*, 736 F.2d 243, 251-52 (5th Cir. 1984) (same), *cert. dismissed*, 473 U.S. 901 (1985); *Splitt v. Deltona Corp.*, 662 F.2d 1142, 1144 (5th Cir. 1981) (defendant's objection to jury instruction on punitive damages preserved issue without motion for a directed verdict on that issue).

Splitt is directly on point. In that case, the defendant moved for a directed verdict on the ground that there was no evidence to support the plaintiff's fraud claim. The defendant also objected to a jury instruction that permitted the jury to find punitive damages on the plaintiff's contract claim. The Fifth Circuit held that the objection to the jury instruction preserved the defendant's right to move for a judgment n.o.v. on punitive damages. *Splitt*, 662 F.2d at 1144-45. The court noted that the objection served the purpose of Rule 50 in that it gave plaintiffs notice of defendants' concern. *Id.*

In the present case, Chase moved for judgment as a matter of law on Petitioner's claim for conversion – the basis of its claim for punitive damages – and timely objected to the punitive damage charge on the ground

that there was no evidence warranting punitive damages. Petitioner had ample notice that Chase was challenging the sufficiency of the evidence on punitives and ample opportunity to offer further evidence – if any there was – to support it.

2. Rule 50 Is Applied Liberally.

Petitioner incorrectly suggests that the Fifth Circuit's application of Rule 50 is inconsistent with that of other circuits and the 1991 amendment to the rule. In fact, there are many cases from other circuits decided both before and after the 1991 amendment affirming that Rule 50 is to be applied liberally. *See, e.g., Rankin v. Evans,* 133 F.3d 1425, 1433 (11th Cir. 1998) ("where the trial court and all parties actually are aware of the grounds upon which the motion is made, strict enforcement of the specificity requirement of Rule 50(a)(2) is unnecessary to serve the purpose of the rule"), *cert. denied,* 119 S.Ct. 67 (1998); *McClaran v. Plastic Industries, Inc.,* 97 F.3d 347, 360 (9th Cir. 1996) (objection to jury instruction on ground of insufficient evidence preserved issue for post-trial Rule 50 motion); *Singer v. Dungan,* 45 F.3d 823, 828-29 (4th Cir. 1995) (noting that "various courts have taken an indulgent view as to what constitutes a sufficient predicate for a Rule 50(b) motion"); *Anderson v. United Telephone Co.,* 933 F.2d 1500, 1503 (10th Cir. 1991) (rigid application of Rule 50 is inappropriate where such application serves neither of the rule's rationales – protecting Seventh Amendment right to trial by jury and ensuring opposing party has enough notice of error to permit an attempt to cure it before resting), *cert. denied,*

502 U.S. 940 (1991); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1331 (6th Cir. 1988) ("in light of 'liberal spirit imbuing the Federal Rules of Civil Procedure,' technical non-compliance with Rule 50(b)'s requirements will not preclude consideration of a JNOV motion so long as the purposes of the rule have been served in a particular case"); *Trujillo v. Goodman*, 825 F.2d 1453, 1456 (10th Cir. 1987) (noting trend is to adopt a liberal view of what constitutes a motion sufficient to preserve a party's rights under Rule 50(b); considering merits of Rule 50(b) motion despite moving party's failure to bring Rule 50(a) motion at close of evidence); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024 n.4 (5th Cir. 1987) ("This Circuit and others have rejected the rigid application of Rule 50(b) in favor of a more liberal approach" (citing cases)); *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir. 1981) (Seventh Circuit has rejected rigid interpretation of the requirements of Rule 50(b)). Commentators also agree that rigid adherence to the technical requirements of the rule is inappropriate. *See, e.g.*, 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2537 at 336-39 (2d ed. 1994) (because Rule 50 "is a potential trap for the unwary, the federal courts fortunately take a liberal view of what constitutes a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient prerequisite for the later motion").[2]

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[2] The only support Petitioner can find for its claim that a formal pre-verdict motion is necessary comes from the *dissent* in *Anderson v. United Telephone Co.*, 933 F.2d 1500 (10th Cir. 1991). Pet. 22 n.5. Indeed, Petitioner acknowledges that there is no need for strict compliance with Rule 50 if the departure is "de

B. Petitioner Was Not Surprised Or Disadvantaged In Any Way.

Petitioner asserts it was "lulled into complacency" by Chase's failure to style its objection to the jury charge as a Rule 50 motion. Pet. 24. This assertion cannot be seriously entertained. Whether Chase had converted the stock – the basis of Petitioner's punitive damage claim – was central to the action and vigorously contested throughout. That Chase denied committing any wrong, much less one which would support a punitive award, could hardly have been a surprise to Petitioner. Chase's objection even to the submission of the punitive damage issue to the jury excluded any possible doubt that it was challenging the sufficiency of the evidence on that point. This was no "stealth" issue, raised for the first time by Chase in its post-trial motions.

C. The Court Of Appeals Did Not Violate Petitioner's Right To A Jury.

Petitioner argues that the Court of Appeals violated its right to a jury trial because it examined the evidence

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minimis" or the party makes a motion which is the "functional equivalent" of a Rule 50 motion. Pet. 16. *See also Davis v. First Nat'l Bank*, 976 F.2d 944, 948-49 (5th Cir. 1992) (excusing de minimis failure to comply with letter of Rule 50(b) and noting that "both this circuit and the Seventh Circuit have approached this issue with a 'liberal spirit' "), *cert. denied*, 508 U.S. 910 (1993); *Merwine v. Board of Trustees*, 754 F.2d 631, 634-35 (5th Cir. 1985) (excusing technical non-compliance with Rule 50), *cert. denied*, 474 U.S. 823 (1985); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216-17 (5th Cir. 1983) (same), *cert. denied*, 465 U.S. 1026 (1984).

and vacated the jury's punitive damages finding. Pet. 25-26. But Petitioner admits, as it must, that an appellate court may determine whether evidence is sufficient as a matter of law. Pet. 25. That is exactly what the Circuit did, concluding that the facts, taken as true, did not meet the standard for a punitive award under Texas law. Pet. App. A at 2a, 18a-22a; *50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.*, 180 F.3d 247, 249, 256-57 (5th Cir. 1999).

Sufficiency of the evidence is a question of law, subject to plenary review. *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998). It does not usurp the jury's province as factfinder to vacate a judgment based on legally insufficient evidence. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943). Petitioner's Seventh Amendment argument is without merit.

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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